MALAYAN BANKING BHD v. MOHD AFFANDI AHMAD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
HASHIM HAMZAH JCA
AZIMAH OMAR JCA
[CIVIL APPEAL NOS: J-02(NCvC)(W)-452-03-2022
& J-02(NCvC)(W)-549-03-2022]
25 SEPTEMBER 2023

Abstract – *A subsequent purchaser, within the context of deferred indefeasibility, is entitled to a qualified protection of deferred indefeasibility. A bona fide purchaser for value is bona fide if he can prove that valuable consideration was paid in view of a bona fide transaction. Even 'equity's darling' could be stripped off its protection if there is evidence of mala fide nature on the transaction. Good faith must be proven in that the subsequent purchaser must prove that he had exercised all due diligence in critically examining the legitimacy of the transaction, not just on the face of the register document of title, but on the documents involved in the transaction itself.*

LAND LAW: *Transfer – Unlawful transfer – Claim by co-administrators cum beneficiaries of deceased estate – Vendor wrongfully sold same two properties of estate to multiple purchasers – Position of subsequent purchaser in context of deferred indefeasibility – Whether subsequent purchaser bona fide purchaser for value – Whether there was proof that purchase price was paid – Whether sale and purchase agreement entered into in bad faith – Whether bank as chargee was subsequent purchaser in context of deferred indefeasibility – Whether bank within category of second layer of subsequent purchaser – Whether bank as chargee derived interest from second purchaser – Whether bank failed to do due diligence to perform simple verification on numerous salient and obvious features of sale and purchase agreement – Whether there was proper evaluation – National Land Code, s. 340(3)*

LAND LAW: *Sale and purchase – Subsequent purchase – Deferred indefeasibility – Vendor wrongfully sold same two properties of estate to multiple purchasers – Position of subsequent purchaser in context of deferred indefeasibility – Whether subsequent purchaser bona fide purchaser for value – Whether there was proof that purchase price was paid – Whether sale and purchase agreement entered into in bad faith – Whether bank as chargee was subsequent purchaser in context of deferred indefeasibility – Whether bank within category of second layer of subsequent purchaser – Whether bank as chargee derived interest from second purchaser –*

Whether bank failed to do due diligence to perform simple verification on numerous salient and obvious features of sale and purchase agreement – Whether there was proper evaluation – National Land Code, s. 340(3)

The present appeals, which stemmed from the decision of the High Court, concerned a claim by co-administrators *cum* beneficiaries ('plaintiffs') of a deceased's estate for the unlawful transfers of two of the deceased's estate properties devised by Pembangunan Tanah dan Perumahan Sdn Bhd ('first defendant') in which the first defendant had wrongfully sold the same two properties of the estate to multiple purchasers *ie*, the estate and the purchaser being Q Development Sdn Bhd ('second defendant'). The second defendant's core contentions were that: (i) the second sale and purchase agreement ('SPA') was entered into with the director of the first defendant ('Syed Ali') and not the first defendant; and (ii) the first defendant had not yet even been incorporated at the time the SPA was entered into between 1967 and 1968. The plaintiffs' case was allowed by the High Court. The High Court held that: (i) the second defendant's position, as the second purchaser, was of the position of a second buyer, *ie*, subsequent purchaser, in the context of deferred indefeasibility; (ii) the second defendant was not a *bona fide* purchaser for value as there was no actual proof that the purchase price was paid by the second defendant to the first defendant under the second SPA; (iii) there were dubious and inexplicable features in the second SPA in an attempt to sell the two properties as vacant lands. The second SPA was entered into in bad faith; (iv) Malayan Banking Bhd ('bank'), as a chargee, was not a subsequent purchaser in the context of deferred indefeasibility as the bank was not within the category of the second layer of subsequent purchaser under the principle. Instead, the bank, as a chargee, derived its interest from the second defendant who was already found not to be a *bona fide* purchaser for value; and (v) the bank failed to prove good faith as it failed to do its due diligence to perform simple verification on numerous salient and obvious features of the second SPA which required proper evaluation. For a sale that was based on a full redemption basis, it was peculiar and incredulous that the bank would release the term loan sum without ever sighting an actual evidence of payment by the second defendant to the first defendant. It was also peculiar that the bank did not bother to verify the condition of the two properties and failed to identify that the two properties were already being occupied and erected with houses instead of being mere vacant lands. The second defendant appealed against the High Court's decision in an attempt to vitiate the estate's claim over the two properties ('Appeal 549'). Meanwhile, the bank appealed against the same decision to insist on the bank's deferred indefeasibility over the two properties as *bona fide* purchaser of the properties through the charge created subsequent to the

two properties' transfer to the second defendant ('Appeal 452'). The issues that arose for adjudication were whether the High Court was correct in deciding that: (i) the SPAs entered into between the deceased and Syed Ali, on behalf of four individuals and the first defendant, were validly binding on the first defendant; (ii) the second defendant, in the context and basis of deferred defeasibility, was a second layer subsequent purchaser; (iii) the bank, being a third layer chargee, derived its rights from the second defendant as the second layer purchaser; and (iv) the bank was not a *bona fide* purchaser for value.

Held (dismissing Appeal 549 and Appeal 452)
Per Azimah Omar JCA delivering the judgment of the court:

(1) The timing of the first defendant's incorporation was a non-issue. There was a barrage of facts that would positively indicate that the subsequent incorporation of and ratification by the second defendant to the two SPAs were within the parties' anticipation and intention. The first defendant had waived its opportunity to participate in the trial and defend against the plaintiffs' claim under the two SPAs. Judgment must be given in favour of the plaintiffs considering that the first defendant, being the only other party privy to the SPAs aside from the deceased *via* the plaintiff, had not even bothered to cross-examine the evidence regarding the validity of the SPAs at trial. Estoppel shall apply to bar the first and second defendants from inequitably denying the validity of the two SPAs. In view of the validity of the two SPAs and the full payment of the purchase prices to the first defendant by the deceased, the first defendant, as vendor, now continuously held the two properties under constructive trust for the benefit of the deceased's estate. The first issue was answered in the positive. (paras 22-23 & 25-27)

(2) Both the deceased and the second defendant were first layer immediate purchasers who bought the same two properties from the first defendant. Although the second defendant's purchase was subsequent in time, the second defendant was still not a second layer subsequent purchaser within the context of deferred indefeasibility. The facts of the present case were more relatable to the context of competing legal/equitable interests between two purchasers who unfortunately bought the same properties from one singular vendor. The deceased's estate was already clothed with right *in rem* over the two properties when he paid the purchases prices for both the properties *circa* 50 years ago. Even if the second defendant had later paid the full purchase price to the first defendant's, which there was no proof of such payment being made, the second defendant would only hold a right *in personam* against the first

defendant under the second SPA. The second defendant's title over the two properties, as first layer immediate purchaser, did not at all enjoy any protection of deferred indefeasibility and should accordingly be vitiated. The second issue was answered in the negative. (paras 33-34 & 37-38)

(3) It naturally followed, from the answer in the second issue, that the High Court must also have been in error in deciding that the bank, as a chargee, derived its rights from the defendant as the second layer purchaser with deferred indefeasibility. The bank, as a chargee, created the charge from the second defendant's, not the first defendant's, supposed title as immediate purchaser over the two properties. Therefore, the bank's position as a chargee fell within the classification of the second layer subsequent purchaser within the context of deferred indefeasibility. The third issue was answered in the negative. (paras 39, 40 & 42)

(4) The bank contended that the face of the title and the second SPA's documentations would not, at all, reveal any indication of the deceased's interest *vide* the sale under the prior two SPAs. However, even if the bank would have no notice of the deceased's interest, it did not automatically allow the bank to assume the legitimacy and validity of the transaction under the second SPA. It remained incumbent upon the bank to examine the second SPA even if there was no notice at all of the deceased's interest from the face of the title. It would be gravely unjust to allow the bank to feign innocence in the face of its glaring omissions, failure of enquiry and insufficient due diligence. Therefore, the bank was indeed not a *bona fide* purchaser for value. The bank, accordingly, ought to be disqualified from relying on its deferred indefeasibility under s. 340(3) of the National Land Code. (paras 48 & 58)

Case(s) referred to:

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***
Ho Yau Hong & Ors v. How Yaw Ming & Another Appeal [2023] 1 LNS 827 CA ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal [2021] 6 CLJ 650 FC ***(refd)***
Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***

Legislation referred to:

National Land Code, s. 340(3)

For the appellant (R6) - Claudia Cheah Pek Yee, Aufa Radzi & Chew Sue Peng; M/s Skrine
For the appellant (R7) - Ummi Salhah Mohamad; M/s Lua & Mansor
For the respondent - Shakir Hussain Khurshed Ibrahim; M/s Kali & Assocs

[Editor's note: For the High Court judgment, please see Mohd Affandi Ahmad & Anor v. Pembangunan Tanah Dan Perumahan Sdn Bhd & Ors [2022] 1 LNS 1217 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Azimah Omar JCA:

Background Facts

[1] The two appeals before us concern a claim by co-administrators *cum* beneficiaries ("the plaintiffs") of a deceased's estate ("the estate") for unlawful transfers of two of the deceased's estate's properties devised by Pembangunan Tanah dan Perumahan Sdn Bhd ("the first defendant") in which the first defendant had wrongfully sold the same two properties of the estate to multiple purchasers (firstly being the estate and the other purchaser being Q Development Sdn Bhd ("the second defendant")).

[2] It remains clear to us that as far as the plaintiffs and the second defendant are concerned, they are both the first layer of immediate purchasers and supposed immediate transferees of the two properties. Thus, contrary to the parties' submissions and the High Court's analysis, the dispute between the plaintiffs and the second defendant should not have been on the premise of deferred indefeasibility under s. 340(3) of the National Land Code.

[3] Instead, the dispute should have appropriately been approached and deliberated on the premise of competing legal/equitable interests between two competing purchasers of the same two properties. The fact that the 'repeated' sale of the two properties to the second defendant occurred only decades after the first sale of the two properties to the deceased does not at all mean that there was a 'subsequent purchaser' or subsequent transferee of the two properties within the context of the principle of deferred indefeasibility. Thus, from the outset we can clearly identify that the parties' submissions (and subsequently the High Court's analysis) had embarked from the wrong tangent and trajectory. Now, although we agree with the High Court's ultimate decision to allow the plaintiffs' claim, we are minded to state that we similarly find so on a totally different analysis and basis. In any case, the parties shall herein be referred to in their original capacities as they were before the High Court.

[4] On the other hand, Malayan Banking Berhad ("the bank") is claiming for deferred indefeasible title as subsequent chargee over the two properties when the second defendant charged the two properties as collateral for the bank's term loan facilities.

[5] The plaintiffs' case was allowed by the High Court. The first defendant did not appeal against the High Court's decision and finding of unlawful transfer. Nor did the first defendant appeal against the High Court's positive finding of the validity of the sale and purchase agreements in which the deceased had entered into to purchase the two properties. The second defendant appealed against the High Court's decision *via* appeal number J-02(NCVC)(W)-549-03/2022 ("Appeal 549") in an attempt to vitiate the estate's claim over the two properties. Meanwhile, the bank appealed against the same decision *via* appeal number J-02(NCVC)(W)-452-03/2022 ("Appeal 452") to insist on the bank's deferred indefeasibility over the two properties as *bona fide* second purchaser of the properties through the charge created subsequent to the two properties' transfer to the second defendant.

Sale And Purchase Of The Two Properties Between The Deceased And The First Defendant

[6] One of the core contentions by the second defendant was that the second defendant was attempting to impugn the validity of the sale and purchase of the two properties between the deceased and the first defendant primarily on the ground of privity of contract. This was purportedly because the sale and purchase agreement was entered into by the deceased with one Syed Ali bin Mohamed Al-Attas (who soon after the agreement became the first defendant's director upon the incorporation of the first defendant) ("Syed AN") *circa* 1967.

[7] The second defendant tried to impress upon the court that the sale between Syed Ali and the deceased should not be considered as a valid sale between the deceased and the first defendant on the ground that the first defendant had not yet even been incorporated at the time the sale and purchase agreements were entered into between 1967 and 1968. This error and misconception by the second defendant shall be dealt with later down this judgment.

[8] In any case, we are minded that the proper party to dispute the sanctity of the sale between the first defendant and the deceased was the first defendant itself who was the actual privy to the sale and purchase agreement and not the second defendant who only came into the picture some 50 years after the sale of the two properties to the deceased's estate.

[9] It was apparent to us that the sale of the two properties were in anticipation of the subsequent incorporation of the first defendant as a future transferee (to later be able to transfer the two properties to the deceased) as per the terms of the sale and purchase agreements. The legitimate sale of a third party's property by a vendor (ahead of actual registration to vendor's name) is not at all uncommon. In view of this arrangement, Syed Husain bin Junid, Syed Jaffar bin Alwee, Syed Yahya bin Junid and Tengku Othman bin Abdullah ("the four individuals") granted a power of attorney to Syed Ali on 26 July 1967 to deal with their lands (which included the two subject properties).

[10] The four individuals were desirous of selling the two properties to the deceased (*via* the intermediary medium of Syed Ali who later incorporated the first defendant in December 1967). The deceased purchased Lot 97 *via* a sale and purchase agreement signed together with Syed Ali (who later become the director of the first defendant) on 6 November 1967 ("97 SPA"). Subsequently, the deceased purchased Lot 716 *via* a sale and purchase agreement signed together with Syed Ali (who was already the director of the first defendant at that time) on 20 March 1968 ("716 SPA") (collectively referred to as "the SPAs").

[11] The Judicial Commissioner ("the learned JC" – now High Court Judge) correctly appreciated the crucial fact and evidence that although both the SPAs were signed with the director of the first defendant, the full purchase prices for both the two properties were fully paid to the first defendant (not Syed Ali). The first defendant although given the opportunity to cross-examine and dispute these payments, have clearly admitted to the truth of these full payments as the first defendant had opted not to bring any witnesses and not to cross-examine the truth of these payments. The full payments of the purchase prices for both the two properties were clearly recorded in the first defendant's own company ledgers.

[12] Again, first defendant as the only other privy to the SPAs have neither challenged these evidences nor did the first defendant cross-examined any of these evidence during trial. The first defendant's unchallenged ledgers indicated that the final instalment for the full purchase price for Lot 97 was settled ("jelas") on 11 December 1970, while the final instalment for the full purchase price for Lot 716 was settled ("jelas") on 14 August 1969. All payments were recorded to have been paid to and received by the first defendant-company.

[13] Just about one month after the 97 SPA (and four months before the 716 SPA), the first defendant was incorporated *circa* December 1967. In furtherance of the SPAs, the first defendant had ratified the SPAs *via* a letter dated 27 December 2005 which the first defendant had issued to the police

("the ratification letter"). Subsequent to the completion of both the SPAs and ratification by the first defendant, the deceased had for more than half a century even until today erected houses and occupied the two properties (now occupied by deceased's beneficiaries after his passing).

Breach Of The Spas And The Second Sale Of The Same Two Properties To The Second Defendant

[14] Fifty years or so passed without event. Unfortunate to the deceased, unbeknownst to him, the first defendant had never transferred and registered the name of the deceased as the registered proprietor of both two properties. Unlawfully and in breach of both SPAs, the first defendant had sold the same properties to a second buyer, the second defendant-company *via* a sale and purchase agreement dated 8 August 2018 ("second SPA"). The peculiar feature of this second SPA was that notwithstanding the clear half century occupation of the two properties by the deceased's estate, the two properties were sold as vacant lands (which was untrue).

[15] The deceased's estate (*via* the plaintiffs) have never slept on their rights and had consistently pursued the transfer of title from the first defendant but to no avail. The matter came to ahead when the second SPA was revealed to the plaintiffs for the first time when the first defendant filed its defence and counterclaim.

Subsequent Charge Of The Two Properties To The Third Defendant-bank For Term Loans To Finance The Second SPA

[16] Although the third defendant bank were trying its best to separate itself from the nuances of the second SPA, it remains undisputed that the term loan that the bank had granted to the second defendant (as chargee of the two properties) was granted on redemption basis for the alleged full purchase price under the second SPA. Succinctly, the bank was the financier for the sale of the two properties under the second SPA. The charge was then registered on 26 June 2019 ("impugned charge").

[17] In protecting the interest of the deceased's estate, the respondent-plaintiffs have commenced an action at the High Court to impugn the propriety of the second SPA and the legality of the impugned charge.

The High Court's Decision

[18] After full trial before the High Court, the learned JC had allowed the plaintiffs' claim primarily on the following grounds:

(i) the second defendant-company's position as the second purchaser was of the position of a second layer (subsequent purchaser) in the context of deferred indefeasibility:

[92] The exception to *nemo dat quod non habet* is where the subsequent transferee is able to prove that it falls within the category of *bona fide* purchaser for valuable consideration. Proof of these requirements, found in the proviso to section 340(3) of the National Land Code, would revive the title of the subsequent purchaser, which in this case was the Second defendant.

(ii) the second defendant-company was not a *bona fide* purchaser for value as there was no actual proof that the purchase price was paid by the second defendant to the first defendant under the second SPA:

[97] There was no evidence of such payment made. In fact, the evidence provided by the Second defendant's first witness, who was its director, Chan Jui Hui ("DW1"), was unconvincing as he was unable to explain the details of the sale and purchase of Lots 97 and 716. He had even contradicted the evidence of the Second defendant's second witness and solicitor, one Wong Yen Chnan ("DW2"), when he said that the money was paid through the Second defendant's solicitors. DW2 had denied receipt of any such payment, but informed the Court that there was merely an acknowledgment from the First defendant, stating that it had received the monies from the Second defendant, although no such acknowledgment was adduced in Court. DW1 subsequently confirmed that there were no documents whatsoever in the Bundle of Documents to prove that the Second defendant had made payment to the First defendant for the purchase price of the Lots.

The contradiction of the Second defendant's own witnesses fortified the plaintiffs' contention that the Second defendant was merely a volunteer pursuant to the SPA of 8 August 2018.

...

Based on the aforesaid evidence, or lack thereof, it was my finding, that the Second defendant was a mere volunteer, and, therefore, could not avail itself of the proviso to section 340(3) of the National Land Code. Alluding to established principles pertaining to the Torrens system registration of land, therefore, as a volunteer and not a purchaser for valuable consideration, the Second defendant did not need any protection.

(iii) there were dubious and inexplicable features in the second SPA in an attempt to sell the two properties as vacant lands. The second SPA was entered into in bad faith:

A holistic evaluation of the evidence led this Court to the irresistible inference that the sale and purchase of Lots 97 and 716 by the Second defendant was not done in good faith, and neither was there valuable consideration, leading to the conclusion that the title of the Second defendant to Lots 97 and 716

must be set aside. At this juncture, I also have to add that during the trial, the Second defendant had dedicated more time and effort in attempting to challenge the plaintiffs' claim *vis-a-vis* the First defendant, rather than proving the requirements of *bona fide* purchaser for valuable consideration.

(emphasis added)

(iv) the bank as chargee was not a subsequent purchaser in the context of deferred indefeasibility as the bank was not within the category of the second layer of subsequent purchaser under the principle. Instead, the learned JC found that the bank as chargee (within the third layer) derived its interest from the second defendant (who was already found not to be a *bona fide* purchaser for value):

[110] In the present case, a scrutiny of that part of the proviso is crucial. The word 'purchaser' in the proviso refers to the Second defendant, and 'any person or body claiming through or under such a purchaser', refers to the third defendant. Since the third defendant's interest was granted by the Second defendant, its interest depended on the title of the Second defendant, and was protected, only if the Second defendant was a purchaser in good faith and for valuable consideration. Since it was my finding that the second defendant had failed to establish that it was a purchaser in good faith and for valuable consideration, its title remained defeasible and, as such, the Third defendant's registered charges were also defeasible. It did not matter if the Third defendant was a *bona fide* purchaser for valuable consideration when it had agreed for the charges on Lots 97 and 716 to be registered in its favour, as the Third defendant was not a subsequent transferee and as such, the requirements of *bona fide* purchaser for valuable consideration did not apply to the Third defendant.

(v) the bank had also failed to prove good faith as the bank had failed to do its due diligence to perform simple verification on numerous salient and obvious features of the second SPA which require proper evaluation. For a sale that was based on a full redemption basis, it was peculiar and incredulous that the bank would release the term loan sum without ever sighting an actual evidence of payment by the second defendant to the first defendant. It was also peculiar that the bank did not bother to verify the condition of the two properties and failed to identify that the two properties were already occupied and erected with houses instead of being mere vacant lands as stated within the second SPA:

and that such loan was on a reimbursement basis, which meant that the amount would be paid to the second defendant after the charge documents were filed at the Land Office. She further testified that the payment of the loan sum was never made directly

> to the first defendant, and that no enquiries were made by the third defendant to ascertain if any monies had actually been transferred by the second defendant to the first defendant.
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> [116] In my view, this was sufficient to put the third defendant on notice of the suspicious nature of the purported sale and purchase of the lots between the first and second defendants, and *the failure of the third defendant to make further enquiries had rendered an absence of bona fide on its part*.
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> ...
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> *... In fact, I had to agree with the plaintiffs that if a proper valuation together with a site visit had been conducted, the Third defendant would have known that although the loan was provided to the Second defendant on the premise that the land was empty, it was, in fact, not the case*, as the Third defendant would have known that the Lots were occupied, as permanent structures were in fact built on it.
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> (emphasis added)

[19] Dissatisfied with the learned JC's decision, the second defendant and the bank had filed the two separate appeals before us at present. Appeal No. J-02 (NCVC)(W)-452-03/2022 ("Appeal 452") was primarily the bank's appeal to defend its position as a *bona fide* purchaser for value as a 'subsequent purchaser' within the context of deferred indefeasibility. On the other hand, Appeal No. J-02 (NCVC)(W)-549-03/2022 ("Appeal 549") was the second defendant's appeal primarily attempting to dispute the validity of the deceased's purchase of the two properties from the first defendant.

The Appeal Before Us

[20] We have perused both the memorandums of appeal, records of appeal, and all respective written submissions in both appeals 452 and 549 and verily believe that the two appeals can both be determined by answering the following issues:

(i) issue 1: Whether or not the learned JC was correct in finding that the SPAs entered into between the deceased and Syed Ali (on behalf of the four individuals and the first defendant) were validly binding on the first defendant;

(ii) issue 2: Whether or not the learned JC was correct to decide on the position of the second defendant on the context and basis of deferred indefeasibility as a second layer subsequent purchaser;

(iii) issue 3: Whether or not the learned JC was correct to decide on the position of the bank on the basis of the bank being a third layer chargee deriving its rights from the second defendant as second layer purchaser; and

(iv) issue 4: Whether or not the learned JC was correct to find that the bank was not a *bona fide* purchaser for value.

Issue 1: Whether Or Not The Learned JC Was Correct In Finding That The SPAs Entered Into Between The Deceased And Syed Ali (On Behalf Of The Four Individuals And The First Defendant) Were Validly Binding On The First Defendant

[21] As mentioned earlier, the second defendant's core contention was to impugn the validity or at least the deceased's privity to claim for the two properties. This contention was premised on two primary grounds:

(i) the two SPAs were entered into with Syed Ali (the director of the first defendant) and not the first defendant *per se*; and

(ii) the 97 SPA was entered into prior to the incorporation of the first defendant.

[22] Notwithstanding, we reiterate that the timing of the first defendant's incorporation was a non-issue. There already was a barrage of facts that would positively indicate that the subsequent incorporation of and ratification by the first defendant to the two SPAs were within the parties' anticipation and intention:

(i) firstly, it could not have been mere coincidence that Syed Ali was the appointed attorney for the four individuals as well as the first defendant's director upon the first defendant's incorporation. There was clear proximity of relationship between the first defendant-company, the four individuals, and the first defendant's director;

(ii) secondly, it could not have been sheer coincidence that the first defendant was incorporated just one month after the 97 SPA and mere four months before the 716 SPA. Thus, there was also a clear proximity of time between both the SPAs and the incorporation of the first defendant (before and after incorporation);

(iii) thirdly, there was a myriad of subsequent conducts by all parties which would support the existence and mutual adherence of the first defendant and the deceased to the terms of the two SPAs:

(a) the first defendant had issued the ratification letter *circa* 2005 to cement the first defendant's commitment and ratification of both the SPAs in support of the deceased's entitlement over the two properties;

(b) there was also the independent testimony of Syed Husin bin Junid ("Syed Husin") (who was one of the four individuals who granted power of attorney to Syed Ali) confirming that the two SPAs signed for Lot 97 and Lot 716 were intended to bind the first defendant and the deceased.

(iv) there was uncontroverted evidence of the first defendant's own ledgers and record that deceased have paid the full purchase price to the first defendant and not Syed Ali *per se*; and

(v) for more than half of a century (51 years), the first defendant although retaining registered interest over Lot 97 and Lot 716, has never complained of the deceased's (and his beneficiaries') continued occupation and erection of houses on the two properties. It is patently obvious that the first defendant admitted to the deceased's entitlement over the two properties *vide* the validly signed SPAs.

[23] In any case, we are minded that the first defendant had waived its opportunity to participate in the trial and defend against the plaintiffs' claims under the two SPAs. The first defendant neither adduced any witnesses nor undertook any cross-examination to prove the contrary. It is now far beyond our hands to disregard the first defendant's admission to the plaintiffs' claims. Thus, we are in agreement with the learned JC's finding that judgment must be given in favour of the plaintiffs considering that the first defendant (the only other privy to the SPAs aside from the deceased *via* the plaintiffs) had not even bothered to cross-examine the evidence regarding the validity of the SPAs at trial. This trite law was recently restated by the Federal Court in the case of *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271; [2020] MLJU 916:

> neither was it put to the lawyer SP1 that such was the first defendant's case *vis-a-vis* P1 during his cross examination. **Failure to properly cross-examine a witness of the adverse party means there is an admission to the fact advanced by the adverse party**. [See, *Browne v. Dunn* [1893] 6 R 67 and *AEG Carapiet v. AY Derderian* AIR [1961] Cal 359 as examples.] (emphasis added)

[24] Even assuming that the first defendant did step up to impugn the validity of the two SPAs, it would be a grave injustice for us to allow any party (be it the first or second defendants) to now resile from a 50 years' worth of consistent admission and acceptance of the terms of sale under the SPAs signed between the first defendant (*via* Syed Ali) and the deceased. The first defendant cannot at one breath accept payments and admits the validity of the two SPAs, and at the same breath contend the invalidity of the same two SPAs.

[25] Estoppel shall apply to bar the first and second defendants from inequitably denying the validity of the two SPAs. The principle of estoppel was very recently restated by the Court of Appeal in the case of *Ho Yau Hong & Ors v. How Yaw Ming & Another Appeal* [2023] 1 LNS 827; [2023] MLJU 933:

> [40] The Federal Court's decision in the case of *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 has cautioned against such adoption of contradictory stances:
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> > When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so". It would facilitate moral decadence within our social structure.
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> [41] Such approbating and reprobating of stances have also been cautioned against by the Court of Appeal in the case of *Cheah Theam Kheang v. City Centre Sdn Bhd & Other Appeals* [2012] 2 CLJ 16 which had held the following:
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> > In other words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v. News (UK) Ltd and Others* (1990) 3 All ER 376 at pp. 383 to 384: There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance

[26] Thus, in view of the validity of the two SPAs and the full payment of the purchase prices to the first defendant-vendor by the deceased, we are in agreement with the learned JC's finding that the first defendant (as vendor) now continuously hold the two properties under constructive trust for the benefit of the deceased's estate. (See: Federal Court in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1)

[27] All of the above considered we answer Issue 1 in the positive in that it was correct for the learned JC to find that the SPAs entered into between the deceased and Syed Ali (on behalf of the four individuals and the first defendant) were validly binding on the first defendant (and that the first defendant now holds the two properties on constructive trust for the benefit of the deceased's estate).

Issue 2: Whether Or Not The Learned JC Was Correct To Decide On The Position Of The Second Defendant On The Context And Basis Of Deferred Indefeasibility As A Second Layer Subsequent Purchaser

[28] Although we appreciate the learned JC's in-depth digest of the principle of deferred indefeasibility under s. 340(3) of the National Land Code, we are pressed to find that the learned JC's application of the principle was unfortunately erroneous. We believe that the learned JC's misapprehension might have been caused by these following facts:

(i) the two properties were first transferred to the first defendant-vendor's registered proprietorship before it was later transferred to the second defendant; and

(ii) the second defendant's subsequent purchase of the same two properties is in a general sense a 'subsequent purchase' and subsequent transfer' of the same two properties.

[29] However, the two facts above do not at all fall within the ambit of deferred indefeasibility. Firstly, the transfer of the two properties to the name of the first defendant was not an issue as the first defendant's rights to sell the two properties as vendor was well entrenched within the two SPAs. The transfer to the first defendant was not the initial transfer which would be the first layer of purchaser/transfer within the context of deferred indefeasibility. It was merely a transfer to cement the first defendant's position as vendor to sell the two properties under the two SPAs and unfortunately abused to sell the same two properties to the second defendant under the second SPA

[30] Secondly, just because the second defendant's purchase of the two properties was 'subsequent in time' does not necessarily mean that the second defendant's purchase was a second layer subsequent purchase within the context of deferred indefeasibility. Instead, in actuality the position of both the deceased and the second defendant was both of first layer immediate purchasers from one and the same vendor (being the first defendant-company). A typical case for deferred indefeasibility can be illustrated as per the illustration A below:

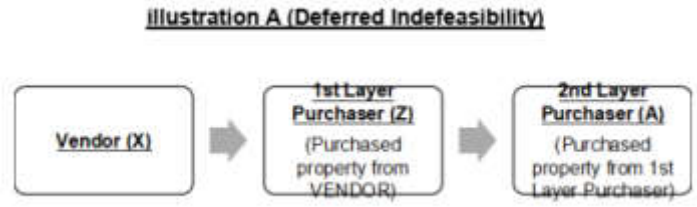


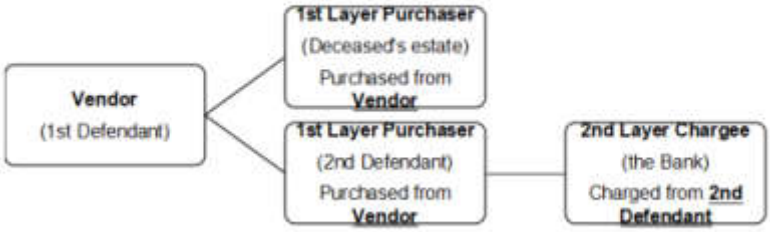
Illustration A (Deferred Indefeasibility)
Vendor (X)
1st Layer Purchaser (Z)
(Purchased property from VENDOR)
2nd Layer Purchaser (A)
(Purchased property from 1st Layer Purchaser)

[31] As can be clearly understood from illustration A above, a second layer purchaser (which equity would clothe with deferred indefeasibility) is a purchaser who have purchased the property from the first layer purchaser (not the vendor). Second layer *bona fide* purchaser for value is dubbed as 'equity's darling' because they are presumed to be innocent purchasers (unless proven otherwise) who were supposedly too remote from and non-partisan to the mischief and unlawful nature of the first layer immediate purchase. The Federal Court in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768 explains deferred indefeasibility in similar terms as follows:

> [37] *Tan Sook Yee's Principles of Singapore Law* (3rd Ed) at p 285 thus illustrated the difference between immediate and deferred indefeasibility:
>
> > An illustration of the difference between both theories is as follows: *X is the original owner.* Y forges X's signature and *sells the property to Z*, who was not privy to the forgery. Z registers the transfer and becomes the new registered proprietor. If indefeasibility were conferred immediately, Z's rights over the land will prevail over X's, notwithstanding that Z's title was derived from forged documents. In contrast, *under the theory of deferred indefeasibility, Z's rights will not prevail as against X. However, should Z then sell the land to A, A will be able to claim indefeasibility* as against X. Indefeasibility of title is thus conferred to the next purchaser. (emphasis added)

[32] In stark contrast to the principle of deferred indefeasibility, the positions of the parties in the present appeal can be illustrated as follows:

Illustration B (Competing Legal/Equitable Interests)



[33] Therefore, it is apparent from illustration B above that both the deceased and the second defendant were first layer immediate purchasers who bought the same two properties from the first defendant. Thus, although the second defendant's purchase was subsequent in time, the second defendant was still not a second layer subsequent purchaser within the context of deferred indefeasibility.

[34] The above considered, the facts of the present case are more relatable to the context of competing legal/equitable interests between two purchasers who unfortunately have bought the same properties from one singular vendor. A most relevant case in point would be the Federal Court decision in *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193; [2016] 3 MLJ 23 ("*Tan Ong Ban*"). In *Tang Ong Ban*, a property was first sold by the vendor to the appellant. The appellant however had yet to pay the full purchase price. The vendor then sold the same property to one Ismail who successfully paid the purchase price. Ismail then sold the same property to the respondent who also paid the full purchase price.

[35] The Court of Appeal found that (and the Federal Court never disagreed) the respondent was a *bona fide* purchaser for value as a second layer purchaser (who bought the property from Ismail). However, the position of both the appellant and Ismail was discussed in the context of competing legal/equitable interest of two first layer immediate purchasers as they both have purchased the same property from the same singular vendor:

> The principle of *beneficial ownership differentiates between the rights of a purchaser of a property who has fully settled the purchase price with one who has not*. This principle clothed a purchaser who had settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she had yet to be registered as the proprietor of the property ...
>
> ...
>
> Therefore, based on the ordinary sale and purchase transaction, the purchaser would acquire, a right *in rem* or a right *in personam*. *Applying the legal principles to the facts of the present case it was clear that the respondent, who had paid the purchase price in full, was the beneficial owner of the property and enjoyed a right in rem over the property, while the appellant, who had not paid the full purchase price of the property, was at best clothed with a right in personam* as against the respondent upon the execution of the first SPA and payment of the sum of RM5,250 to JAS. As such, the appellant's right was purely contractual in nature as against JAS and no cause of action could lie against the respondent, who was a complete stranger to the contract.
>
> (emphasis added)

[36] Applying the above to the appeals before us, the deceased's estate was already clothed with right *in rem* over the two properties when he paid the purchase prices for both the two properties circa 50 years ago. By this time, the first defendant-vendor was already holding the two properties as constructive trustee for the benefit of the deceased. It naturally follows that when the second SPA was signed on 8 August 2018, the vendor actually no longer has good title to sell or pass onto the second defendant. Thus, even if the second defendant had later paid the full purchase price to the first defendant-vendor (which there were no proof of such payment being made) the second defendant would only hold a right *in personam* against the first defendant-vendor under the second SPA.

[37] Therefore, by and large, the entirety of the learned JC's discourse on whether or not the second defendant was a *bona fide* purchaser for value was unnecessary. The second defendant's title over the two properties as first layer immediate purchaser does not at all enjoy any the protection of deferred indefeasibility and should accordingly be vitiated.

[38] All of the above considered we answer issue two in the negative. It was wrong for the learned JC to decide on the position of the second defendant on the context and basis of deferred indefeasibility as a second layer subsequent purchaser. The second defendant as an immediate purchaser of the two properties from the first defendant-vendor does not enjoy the protection of deferred indefeasibility. In any case, the second defendant as the second purchaser in time does not in any manner prevail over the rights and title of the deceased's estate.

Issue 3: Whether Or Not The Learned JC Was Correct To Decide On The Position Of The Bank On The Basis Of The Bank Being A Third Layer Chargee Deriving Its Rights From The Second Defendant As Second Layer Purchaser

[39] There is no need for us to go to extremity of lengths to determine this issue as it naturally follows from our answer in issue two that the learned JC must also have been in error in deciding that the bank as chargee derived its rights from the second defendant as the second layer purchaser with deferred indefeasibility.

[40] As we have mentioned in illustration B above, the bank as chargee created the charge from the second defendant's (not the first defendant-vendor's) supposed title as immediate purchaser over the two properties. Thus, the bank's position as chargee falls within the classification of the second layer subsequent purchaser within the context of deferred indefeasibility.

[41] This is in line with settled law as recently restated by the Federal Court in the case of *See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal* [2021] 6 CLJ 650; [2021] 5 MLJ 759:

> The COA was correct to find that, on the facts, UOB was a subsequent purchaser. Heveaplast became an immediate purchaser when it was registered as the owner of the land pursuant to SPA1. *In its capacity as immediate purchaser, Heveaplast created the UOB charges. Since a purchaser who acquired the interest from the immediate purchaser was a subsequent purchaser, it followed that UOB was a subsequent purchaser and the proviso to s. 340(3) of the NLC applied*. It was then only necessary to ascertain if UOB was a *bona fide* purchaser for value. If it was not, then its interest in the land under the UOB charges was defeasible and liable to be set aside.
>
> (emphasis added)

[42] Thus, we similarly answer issue three in the negative. The learned JC was wrong to decide on the position of the bank on the basis of the bank being a third layer chargee deriving its rights from the second defendant as second layer subsequent purchaser within the context of deferred indefeasibility.

Issue 4: Whether Or Not The Learned JC Was Correct To Find That The Bank Was Not A *Bona Fide* Purchaser For Value

[43] It is trite law that a subsequent purchaser within the context of deferred indefeasibility is entitled to a qualified protection of deferred indefeasibility. A *bona fide* purchaser for value is *bona fide* if he can prove that valuable consideration was paid in view of a *bona fide* transaction. Even equity's darling can be stripped of its protection if there was evidence of *mala fide* nature of the transaction. This qualified protection was also restated by the Federal Court in *See Leong Chye* (*supra*):

> **It was then only necessary to ascertain if UOB was a *bona fide* purchaser for value. If it was not, then its interest in the land under the UOB charges was defeasible and liable to be set aside**. Since there was no evidence to the contrary, UOB was a subsequent purchaser in good faith and for valuable consideration and its interest in the land under the UOB charges was indefeasible under the proviso to s. 340(3) and could not be set aside.
>
> (emphasis added)

[44] Now, the bank strenuously contended that it had exercised utmost due diligence to ascertain the propriety of the sale of the two properties between the first defendant and the second defendant to become the financier of the sale under the second SPA. We are most aware that the bank was neither a signatory nor a party involved in the negotiations leading up to the signing of the second SPA. But, the bank certainly was still involved in the transaction as the bank was considering to become the chargee over the two

properties in consideration of the term loans to be granted to finance the purchase by the second defendant. Thus, as chargee financing the sale under the second SPA, it is at least incumbent upon the bank to the best of its capabilities to ascertain the validity, accuracy, correctness, and legitimacy of the transaction under the second SPA before disbursing the term loan to finance the second defendant's purchase.

[45] The learned JC had aptly appreciated the extent and nature of 'good faith' to qualify for the protection of deferred indefeasibility. Suffice for us to reproduce the learned JC's digest of the meaning of 'good faith' here:

> [102] *'Good faith' in the context of the proviso to section 340(3) of the National Land Code includes due inquiry, and implies not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable man*. It contemplates an honest effort to ascertain the facts upon which exercise of the power must rest; it must, therefore, be summed up as 'an honest determination from ascertained facts. Although the phrase may vary in the context of a different statute, subject and situation, honest intent free from taint or fraud, or fraudulent design, is a constant element of its connotation': per Azahar Mohamed FCJ in *T Sivam a/l Tharamalingam v. Public Bank Berhad* [2018] 6 CLJ 1.
>
> [103] 'Good faith' on the transferee's part must involve more than a belief that all the steps have been regularly and properly done; the transferee must have no reason to believe that there is anything dubious about the transaction. *'in this context, the transferee's acting in good faith must also involve his not having knowledge about the fraudulent intent of the transferor. I will, therefore, consider good faith and knowledge together'*: per Judith Prakash J in *Wong Ser Wan v. Ng Bok Eng Holdings Pte Ltd* [2004] 4 SLR(R).
>
> (emphasis added)

[46] In brief, good faith must be proven in that the subsequent purchaser (or chargee in this appeal) must prove that he had exercised all due diligence in critically examining the legitimacy of the transaction not just on the face of the register document of title, but on the documents involved in the transaction itself. Thus, the pristine 'innocence' and 'conscience' of the bank must be proven in that the bank must critically look into the documentation, transactional documents (payments and receipts) leading up to the sale and purchase of the two properties under the second SPA.

[47] Although the general rule of the Torrens system is that every dealing regarding a property is assumed to be reflected within the register document of title, but it would be remiss and naive for us to rigidly apply such assumption while ignoring the glaring realities and dangers of unscrupulous transactions that can clearly be identified by examinations and verification exercises into the SPA documentation itself. The bank must clearly prove

that it was impossible for the Bank to have known of the unlawfulness of the transaction even after proper examination and verification of the documents under the second SPA.

[48] Now, the bank firstly contended that the face of the title and the second SPA's documentations would not at all reveal any indication of the deceased's interest *vide* the sale under the prior two SPAs. But we are pressed to state that even if the bank would have no notice of the deceased's interest, it does not automatically allow the bank to assume the legitimacy and validity of the transaction under the second SPA. It remains incumbent upon the bank to examine the second SPA even if there was no notice at all of the deceased's interest from the face of the title. It must be remembered that notice of the deceased's interest and notice of the illegitimacy of the second SPA are two separate contexts and natures of notices.

[49] Thus, even assuming that the bank can prove that it genuinely had no knowledge of the deceased's interest, it is still incumbent upon the bank to prove that it genuinely had done proper examination into the propriety of the second SPA between the first defendant and second defendant. This rule was admitted by the bank within the bank's own written submission as the bank had listed down the due diligence it had exercised to ascertain whether or not the two properties can be validly charged to the bank:

(i) appointing Messrs Yeow & Salleh ("bank's solicitors") to prepare charge instruments and perform due diligence to verify that the properties can be charged to the bank;

(ii) the bank's solicitors conducted company searches on the first and second defendants;

(iii) the bank's solicitors conducted winding up searches on the first and second defendants;

(iv) the bank's solicitors conducted bankruptcy searches on the first and second defendants' directors;

(v) the bank's solicitors conducted land searches on the two properties; and

(vi) the bank's solicitors supposedly obtained confirmation of full payment of the purchase by the second defendant to the first defendant company under the second SPA.

[50] Now, it is not within our scope of appellate intervention to re-try the evidence at Trial at this appellate stage. Thus, we shall proceed to examine learned JC's appreciation and deliberation into the evidences adduced into court in determining the 'innocence' of the bank during trial.

[51] One of the most curious and beguiling features within the second SPA was the scrupulous circumstances surrounding the payment of the purchase price by the second defendant to the first defendant. The learned JC had aptly noted that, there was gross discrepancies regarding the evidence of actual payment ever being made by the second defendant to the first defendant that should have reasonably come to the bank's notice (with reasonable due diligence):

(i) firstly, the learned JC astutely considered that it was peculiar that the bank would be eager to release the term loan without sighting any actual evidence of monies being paid by the second defendant to the first defendant. It was the bank's own case that the term loan was granted on redemption basis upon proof of payment of full purchase price under the second SPA to the first defendant. Thus, it is patently obvious that actual proof of payment of the purchase price is indeed critical to the creation of the charge. But instead, the learned JC had noted that the bank was already eager to release the term loan after only sighting a confirmation by the first defendant of receiving the full purchase price from the second defendant;

(ii) the bank admitted that it had not gone beyond the first defendant's confirmation to enquire for proper accounts and receipts of the payment by the second defendant (which obviously would be crucial to determine the legitimacy of the payments by the second defendant); and

(iii) the learned JC astutely noted that there were contradictions between the second defendant's own director, Chan Jui Hui (DW1) and the second defendant's own appointed solicitor, Wong Yen Chnan (DW2) regarding the manner and method the second defendant had paid the purchase price. DW1 testified that the second defendant's payment was made through DW2. On the contrary, DW2 denied receiving any monies from the second defendant and that there was merely an acknowledgment of payment by DW1.

[52] This entire conundrum regarding the payment under the second SPA could have been demystified had the bank just took the simple initiative to properly request for proper accounts and receipts to prove actual payment of the purchase price by the second defendant to the first defendant. An obvious, simple, and straightforward initiative that the bank had peculiarly failed to undertake.

[53] Another conspicuous feature of the second SPA that the learned JC had noted was the fact that the second SPA had transacted the two properties on the basis that Lot 97 and Lot 716 Were Vacant Lands (which was untrue even before the time the second SPA was initially executed on 8 August

2018). Now, it is not that we are supposing that the bank as a financial institution would as a general rule be expected to do an in situ visit of all the lands which the bank intends to take in as collateral under a charge. Nonetheless, none can deny the utility of at least an evaluation report to be done before the bank can determine the 'fiscal viability' of a purported charge in comparison to the amount so applied for the loan.

[54] It is common sense in mathematical and logical sense that the bank would ascertain the profit and loss margins it may incur in any financial facility the bank may intend to grant. Thus, it surely must be within the bank's best interest for a valuation to be done to ascertain the value of the two properties before the bank can extrapolate the appropriate amount the bank would be willing to risk if in case the bank were to grant the term loan to the second defendant. Thus, the valuation of the two properties would clearly reveal to the bank of the actual status of the two properties in that the properties were clearly not vacant and were for more than half a century occupied by the deceased (and or the deceased's beneficiaries). Thus, although the bank might not be expected to conduct an *in situ* visit upon the two properties, it would be common business sense that it would be in the best interest of the bank to ascertain whether or not the two properties were vacant lands or built-up lands (to ascertain the value of the two properties).

[55] Nonetheless, continuing the bank's series of questionable omissions, the bank had failed to at least hire a valuer to prepare a valuation report upon the two properties prior to agreeing to the charges to be created. The learned JC also aptly appreciated that although the bank's own witness, DW3 had testified that the bank had indeed conducted a valuation, the bank had somehow failed and refused to adduce any valuation report before the High Court.

[56] It is glaring to us that the bank (apart from its indifference to the proof of actual payment under the second SPA) somehow was also indifferent to the actual value and status of the properties before agreeing to the charge being created.

[57] Thus, the numerous omissions by the bank were sufficiently telling of the bank's indifference and failure of due diligence. The bank had not exerted the reasonable amount of prudence which would have revealed to the bank of the dubious features surrounding the second SPA ...

(i) had the bank prudently and reasonably enquired for actual proof of payment under the second SPA, it would have been obvious to the bank that the second defendant had not paid the purchase price as the first and second defendants had insisted; and

(ii) had the bank prudently and reasonably enquired for the value and status of the two properties, it would have been obvious to the bank that the two properties were definitely not mere vacant lands as the second SPA had insisted.

[58] All the above considered, it would be gravely unjust for us to allow the bank to feign innocence in the face of its own glaring omissions, failure of enquiry, and insufficient due diligence. Thus, we are in full agreement with the learned JC's finding that the bank was indeed not a *bona fide* purchaser for value. The bank accordingly ought to be disqualified from relying on its deferred indefeasibility under s. 340(3) of the National Land Code.

Our Decision

[59] We pause here to state that the two appeals here are strictly limited to Lots 97 and 716 as these were the only two lots that were transferred by the first defendant to the second defendant and was later charged to the bank. We are aware that there were also Lot 430 and Lot 607 which were in dispute between the deceased's estate (*via* the plaintiffs) and the first defendant that the second defendant and the bank were never privy to. Considering that the first defendant had not appealed against the entirety of the learned JC's decision, it is only appropriate that we do not overstep the scope of the present appeals and disturb the learned JC's decision regarding Lot 430 and Lot 607.

[60] Considering all of the above deliberations, in principle we are in full agreement with the learned JC's ultimate finding that:

(i) the first defendant as trustee was and is still holding Lots 97 and 716 under a constructive trust for the benefit of the deceased's estate;

(ii) the second defendant does not hold good title or claim over Lots 97 and 716 that can prevail against the deceased's estate's prior title over the same two properties; and

(iii) the bank was not a *bona fide* purchaser for value.

[61] And therefore, the learned JC's final determinations above must not be disturbed.

[62] In the result, the second defendant's appeal (Appeal 549) and the bank's appeal (Appeal 452) are dismissed with costs. The decision of the High Court is affirmed. Accordingly, we order the appellants in Appeal 549 and Appeal 452 to pay costs of RM30,000 each to plaintiffs-respondents subject to payment of allocatur.